A **DATUK HARRIS MOHD SALLEH**

v.

DATUK YONG TECK LEE & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI J
[SUIT NO: K22-128-2010-1]
7 MARCH 2012

C ***CIVIL PROCEDURE:*** *Striking out - Application, for - Whether permissible to strike out a claim after trial has commenced and evidence has been adduced - Application to strike off claim in defamation suit on grounds of failure to identify defamatory statements and failure to plead extrinsic facts relied upon to prove alleged innuendo - Whether suitable*
D *case for striking out - Whether defendant should apply for determination under O. 14A or under O. 33 r. 2 of the Rules of the High Court 1980 - Rules of the High Court 1980, O. 18 r. 19*

TORT: *Defamation - Damages - Factors determining quantum of*
E *damages - Seriousness of libel - Recklessness in publication - Insinuation of criminal conduct - Compensatory, aggravated and exemplary damages*

TORT: *Defamation - Libel - Newspaper articles - Whether statements referred to plaintiff - Whether words complained of bore defamatory meaning against plaintiff - Test for determining whether words complained*
F *of were defamatory - Whether defendants published news articles - Whether statements maliciously made against plaintiff - Whether statements were qualified privilege - Whether statements were fair comments and made in good faith - Whether defamation established*

G This was a clash between two ex-Chief Ministers of Sabah over two articles published in the Daily Express which the plaintiff claimed to be defamatory of him. The second defendant was a political party headed by the first defendant. The controversy was triggered by a speech delivered by Tengku Razaleigh Hamzah
H ("Tengku Razaleigh") on 2 April 2010. It was a revelation by Tengku Razaleigh that one day in 1976, minutes before their aircraft was due to take off from the Labuan Airport and when he was already strapped to his seat, the plaintiff had come over and invited him to visit Pulau Banggi, Kudat to see a cattle farm
I project. Hence, the plaintiff, Tengku Razaleigh and a few others had left the plane. The plane later crashed near Kota Kinabalu

killing all on board including the then newly appointed Chief Minister, the late Tun Fuad Stephens and more than half of the Berjaya Cabinet Ministers. This was known as the double six tragedy. After the demise of Tun Fuad Stephens, the plaintiff who was then the Deputy Chief Minister of Sabah took over as Chief Minister. The first defendant latched on to the speech by Tengku Razaleigh by causing to be published on 5 April 2010 the first statement calling for the investigation file on the crash to be re-opened. Two days after the publication of this statement the plaintiff issued a press statement of his own disputing the accuracy of the accounts given by Tengku Razaleigh and gave his own version of events prior to the incident and challenged the defendants to repeat their remarks and accusations more specifically and openly. The 1st defendant accepted the challenge by causing to be published in the same newspaper a second statement dated 9 April 2010. The plaintiff testified that the statements in the two articles could be understood to, *inter alia*, mean that he must be investigated because he had conspired with others to assassinate the late Tun Fuad Stephens and other State Ministers to grab power and become the Chief Minister of Sabah himself after the demise of the late Tun Fuad Stephens. The agreed issues to be tried were: (i) whether the two news articles referred to the plaintiff. It was contended that the statements did not refer to the plaintiff as there was no reference to the plaintiff in the two statements; (ii) whether the words complained of in the said news articles bore any defamatory meaning against the plaintiff; (iii) whether the defendants published and/or were responsible for the publication of the said news articles; (iv) whether the said statements were maliciously made against the plaintiff; (v) whether the said statements were qualified privilege; (vi) whether the said statements were fair comments and made in good faith; and (vii) what was the quantum of damages that the defendants were liable to pay. At the outset of his closing speech, learned counsel for the defendants urged the court to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980 ("the RHC") on the ground that the plaintiff failed to highlight or identify which paragraphs or parts of the defendants' statements that were defamatory of him and further failed to plead the extrinsic facts that he was seeking to rely on in proving the alleged innuendo ("the application").

A B C D E F G H I

Held:

(1) The application was not part of the agreed issues to be tried and in any event no formal application under O. 18 r. 19 of the RHC was made by the defendants. The defendants could also have applied for determination under O. 14A or under O. 33 r. 2 of the RHC but instead allowed the trial to proceed to its conclusion. Order 18 r. 19 is meant for striking out pleadings and indorsements and not for striking out a claim where the trial has commenced and evidence has been adduced. (paras 19 & 20)

(2) There could be no dispute that the impugned statements were made and that they were made in the context of the speech made by Tengku Razaleigh. Therefore the question of identifying which paragraphs of the statements were defamatory of the plaintiff did not arise. Clearly they were those parts of the statements that called for a re-investigation of the double six tragedy. (para 21)

(3) It is trite law that in a libel action the words complained of must refer to the plaintiff. It is not necessary that the plaintiff must be mentioned by name. So long as he could be identified as the person targeted that will be sufficient. In the present case there could be no argument that those who were acquainted with the plaintiff could make out that he was the person meant by the 1st defendant in the two statements. (paras 23, 24 & 26)

(4) The test of whether the words complained of are defamatory is an objective one. They are defamatory if, when viewed objectively they have a tendency to harm a person by lowering him in the eyes of right thinking members of the public. The rule that guides the court in deciding whether the words complained of are defamatory is the test of reasonableness. It is no defence for the defendant to show that he did not intend to defame the plaintiff however noble his intention was, if reasonable people would consider the language to be defamatory. (paras 31 & 32)

(5) There was nothing wrong for the 1st defendant to call for a re-investigation of the double six tragedy but when he insinuated that the plaintiff had blood on his hand without

making any attempt to verify the truth of the alleged new information revealed by Tengku Razaleigh, the 1st defendant had crossed the line separating fair comment and malice aforethought. Viewed objectively and applying the reasonableness test the statements were clearly defamatory of the plaintiff. A conspiracy to assassinate is a capital offence punishable with death under s. 120B(1) of the Penal Code. The statements were therefore defamatory without proof of special damage. (paras 34 & 37)

(6) A statement that is motivated by a desire to impute someone with a disgraceful act is *prima facie* defamatory. Once the defamatory nature of the words are established the defendant can only escape liability by establishing the defence of justification, qualified privilege or fair comment. (para 40)

(7) In relation to publication of the two statements, the 1st defendant admitted that he knew or expected his press statements to be published by the press. (para 43)

(8) The 1st defendant did not verify with Tengku Razaleigh on the accuracy of his revelation. It was obvious that the 1st defendant did not care whether the revelation by Tengku Razaleigh was true or not. He was therefore to be treated as if he knew the revelation to be false. This indifference and couldn't care less attitude was evidence of malice on the part of the 1st defendant and by extension the 2nd defendant. (para 59)

(9) Since malice had been proved against the 1st and 2nd defendants on the balance of probability, this disposed of the defence of qualified privilege and fair comment. (para 81)

(10) The seriousness of the libel and the recklessness in the way it is published are relevant factors in determining the quantum of damages. In the present case the insinuation of criminal conduct was a very serious libel perpetrated on the plaintiff. In the circumstances, a global sum of RM1 million for compensatory, aggravated and exemplary damages was fair and reasonable, having regard to the seriousness of the libel, the recklessness in its publication and the strong aggravating factors weighing against the defendants. (paras 92 & 105)

Case(s) referred to:

Abd Rahman Mamat v. Zakaria Senik & 5 Lagi [2002] 1 LNS 278 HC ***(refd)***

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***

Adam v. Ward [1917] AC 309 ***(refd)***

Blackshaw v. Lord & Anor [1983] 2 All ER 311 ***(refd)***

Bourke v. Warren 2 C & P 307 ***(refd)***

Chin Choon v. Chua Jui Meng [2005] 2 CLJ 569 CA ***(refd)***

Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***

Dato' Dr Tan Chee Khuan v. Chin Choong Seng [2011] 8 CLJ 574 HC ***(refd)***

Datuk Harris Mohd Salleh v. Abdul Jalil Ahmad & Anor [1983] 2 CLJ 211; [1983] CLJ (Rep) 521 HC ***(refd)***

Datuk Harris Mohd Salleh v. Datuk Shafie Hj Apdal & Ors [2009] 2 CLJ 682 HC ***(refd)***

Datuk Harris Mohd Salleh v. Han Ling & Anor [1996] 1 LNS 167 HC ***(refd)***

Datuk Harris Mohd Salleh v. The Government of Malaysia & Ors [2010] 1 LNS 1723 HC ***(refd)***

E Hulton & Co v. Jones [1910] AC 20 ***(refd)***

Gray v. Jones [1939] 1 All ER 798 ***(refd)***

Hasnul Abdul Hadi v. Bulat Mohamed & Anor [1977] 3 LNS 2 HC ***(refd)***

Horrock v. Lowe [1974] 1 All ER 662 ***(refd)***

Hellwig v. Mitchell [1910] 1 KB 609 ***(refd)***

Jameel v. Wall Street Journal Europe Sprl [2006] 4 All ER 1279 ***(refd)***

Jones v. Skelton [1963] 3 All ER 952 ***(refd)***

Joshua Benjamin Jeyaretnam v. Goh Chok Thong [1989] 1 LNS 34 PC ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Karpal Singh Ram Singh v. DP Vijandran [2001] 3 CLJ 871 CA ***(refd)***

Knupffer v. London Express Newspaper Ltd [1944] AC 116 ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2000] 3 CLJ 224 CA ***(refd)***

Lewis v. Daily Telegraph Ltd [1962] 3 WLR 50 ***(refd)***

London Artist Ltd v. Littler [1969] 2 QBD 375 ***(refd)***

Mark Ignatius Uttley v. Wong Kam Hor & Anor [2002] 8 CLJ 628 HC ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***

Slipper v. British Broadcasting Corp [1991] All ER 165 ***(refd)***

Tan Pei Ing v. Ainon Ali & Ors [2009] 1 LNS 73 HC ***(dist)***

Toogood v. Sprying [1834] 1 CM & Are ***(refd)***

Tun Datu Hj Mustapha Datu Harun v. Tun Datuk Hj Mohammad Adnan Robert, Yang Di-Pertua Negeri Sabah & Anor [1988] 2 CLJ 330; [1988] 2 CLJ (Rep) 480 ***(refd)***
Webb v. Beavan [1883] 11 QBD 609 ***(refd)***

Legislation referred to:
Defamation Act 1957, ss. 9, 12
Evidence Act 1950, s. 134
Penal Code, s. 120B(1)
Rules of the High Court 1980, O. 14A, O. 18 r. 19(2), O. 33 r. 2

Other source(s) referred to:
Gatley on Libel and Slander, 8th edn, p 697
Keith R Evans, *The Law of Defamation in Singapore and Malaysia*, MLJ Sdn Bhd 1988, chapter 12, pp 101-105

For the plaintiff - Yunof Maringking (Trevor Maringking with him); M/s Maringking & Co
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JUDGMENT

Abdul Rahman Sebli J:

The Facts

[1] This is a clash between two ex-Chief Ministers of Sabah over two articles published in the Daily Express on 5 April 2010 and 9 April 2010 respectively which the plaintiff claims to be defamatory of him. The second defendant is a political party headed by the 1st defendant. The controversy was triggered by a speech delivered by Tengku Razaleigh Hamzah ("Tengku Razaleigh") at the Hongkod Koisan KDCA Penampang, Sabah on 2 April 2010 and which was published in the Daily Express on 4 April 2010 with the caption "Invite saved my life: Razaleigh". The topic of the speech was "Minyak Sabah Untuk Siapa?" the relevant parts of which are the following:

> Apabila cakap hal minyak dan Sabah, tak dapat tiada saya mesti mengingat kembali peristiwa yang amat sedih yang berlaku di sini yang menimpa rakyat Sabah dan negeri Sabah terutama sekali. Saya ingat dalam bulan Jun tahun 76, satu kemalangan besar berlaku di Sabah. Umur saya panjang, orang kenalan saya yang saya sanjung

tinggi umurnya pendek. Allahyarham Yang Amat Berhormat Tun Fuad Stephens dan anaknya sekali dengan pemimpin-pemimpin yang lain dari negeri Sabah dan juga pegawai-pegawai dari negeri Sabah dan dari kerajaan pusat bersekali dengan setiausaha sulit saya telah menjadi mangsa nahas apabila jatuhnya kapal terbang yang dinaiki mereka. Saya sendiri sudahpun menaiki pesawat berkenaan bersekali dengan Tun Rahman Yaakob dan bersama-sama dengan saya melawat Labuan dan juga Sabah ketika itu dan dengan Almarhum Tengku Arif Bendahara Pahang. *Kita semua sudah "strapped" dah pakai tali pinggang kapalterbang. Saya duduk di belakang Allahyarham Tun Fuad Stephens, sebelah kanan saya Tun Rahman Yaakob, sebelah belakang saya Tengku Arif Bendahara Pahang. Tiba-tiba Datuk Harris yang pada masa itu menjadi Timbalan Ketua Menteri Sabah mengajak saya keluar dari kapalterbang, kerana dia kata elok kita ke Pulau Banggi melihat rancangan belaan sapi dari Australia di Pulau Banggi.* Saya pun ajak Tun Rahman Yaakob dan Tengku Arif Bendahara bersama dengan saya turun kerana saya kata elok juga kita ikut Datuk Harris ke Pulau Banggi kerana saya nak tengok rancangan bela sapi, kita panggil lembu, di Pulau Banggi. Jadi kita pun ikut Datuk Harris ikut kapalterbang jenis yang sama Nomad, kita pergi ke Pulau Banggi.

[2] It is common ground that this is the context in which the impugned statements were made. It was a revelation by Tengku Razaleigh that minutes before the Nomad aircraft was due to take off from the Labuan airport and when he was already strapped to his seat, the plaintiff came over and invited him to visit Pulau Banggi, Kudat to see a cattle farm project. The plane later crashed near Sembulan, Kota Kinabalu killing all on board including the newly appointed Chief Minister, the late Tun Fuad Stephens and more than half of the Berjaya Cabinet Ministers.

[3] That was some 36 years ago. Some call it the double six tragedy while some others call it the triple six tragedy as it occurred on 6 June 1976. For purposes of this judgment I shall refer to the incident as the double six tragedy as that was how it was referred to throughout the trial. After the demise of Tun Fuad Stephens, the plaintiff who was then the Deputy Chief Minister of Sabah took over as Chief Minister. He held on to the post until his Berjaya Party was defeated in the 1985 Sabah State Election.

[4] The 1st defendant latched on to the speech by Tengku Razaleigh by causing it to be published on 5 April 2010 the first statement under the caption "SAPP WANTS FILE ON TRIPLE SIX TRAGEDY PROBE REOPENED" which reads:

The opposition Sabah Progressive Party (SAPP) has called for the investigation file on the June 6, 1976 Nomad air crash that claimed the lives of leading Sabah politicians including newly-elected Chief Minister Tun Fuad Stephens – to be re-opened to remove all doubts about the true causes.

Its President Datuk Yong Teck Lee said Tengku Razaleigh Hamzah's first hand account of how he left the ill-fated aircraft at the very last moment that saved his life also opens up old speculation of how the plane crashed in Sembulan.

How we remember the past shapes how we look at today's Sabah. It is for this reason that SAPP repeats our call for the lifting of the ban on the book 'Golden Son of the Kadazan' about a prominent victim in the crash, Datuk Peter Mojuntin.

It is also time to reopen the investigation in the June 6, 1976 air crash so that all doubt about the true causes of the crash are removed.

Prior to Razaleigh's revelation he said the people in Sabah had relied on word of mouth and other indirect sources. He said the 1976 book "The Politics of Federalism, Syed Kechik in East Malaysia" had described Razaleigh as the "point man" in engineering and funding the defeat of Usno Alliance by Party Berjaya in 1976.

Syed Kechik (now deceased) had, in the book, said that the late Tun Mustapha felt that future generations of Sabahans might later criticize his surrender of the State's wealth to the Federal Government, and he wanted the clause "in perpetuity" be removed from the petroleum agreement.

Now that this fact has been reliably corroborated by a surviving, credible leader (Razaleigh) of the time, Sabahans will gain a better understanding of the political and economic relationship between Sabah and the Federal Government, he said.

[5] Two days after the publication of this statement the plaintiff issued a press statement of his own disputing the accuracy of the accounts given by Tengku Razaleigh and gave his own version of events prior to the incident and challenged the defendants to repeat their remarks and accusations more specifically and openly.

[6] The 1st defendant accepted the challenge by causing to be published in the same newspaper a second statement captioned "BASIS TO REOPEN DUE TO NEW INFO: YONG" dated 9 April 2010. The article reads as follows:

> Sabah Progressive Party (SAPP) President Datuk Yong Teck Lee said it is to be expected that the people will want to re-examine the June 6, 1976 air crash in light of Tengku Razaleigh Hamzah's memory of the tragedy.
>
> Responding to former Chief Minister Datuk Harris Salleh's response to his call to re-open the investigation, Yong said Razaleigh was trying to tell the people something from the past in view of his revelation on the moment before the Nomad aircraft took off from Labuan.
>
> Normally, it is proper to re-open an investigation into an old incident if new information surface. In this case, the new information is Razaleigh's version of event that has been put on public record for the first time.
>
> Maybe nothing new will come out of the re-investigation. Or maybe something big and explosive will surface from the depths of history.
>
> Yong said historians and forensic scientists regularly re-examine past accidents, crime and unexplained incidents.
>
> Issues like the Kennedy, Martin Luther King and Benazir Bhutto assassinations and the Lady Diana death and many other cases are the subject of continuous study, he said.

The Plaintiff's Claim

[7] At the trial the plaintiff testified that he was embarrassed and distressed when the 1st defendant issued the second statement, which to him meant that the 1st defendant disbelieved his version of events. His contention is that the statements in the two articles could be understood to mean that he must be investigated because he had conspired with others:

(1) to assassinate the late Tun Fuad Stephens who was then the Chief Minister of Sabah and other State Ministers and officials who were then travelling with him;

(2) to grab power and become the Chief Minister of Sabah himself after the demise of the late Tun Fuad Stephens;

(3) to replace the then Chief Minister by way of assassination of Tun Fuad Stephens;

(4) to facilitate the signing of a Petroleum Agreement between the Sabah State Government and the Federal Government; and

(5) to hand over the petroleum wealth of the State of Sabah to Petronas and/or the Federal Government.

[8] The defendants on the other hand contend that the plaintiff was being ultra sensitive and that it was only a figment of his imagination that the call for re-investigation was defamatory of him.

[9] The plaintiff is claiming not less than RM50 million against the 1st and 2nd defendants for what he claims to be character assassination. The defendants' position is that in the event the statements are ruled to be defamatory, the plaintiff is not to be awarded damages at all or only nominal damages and with no order as to costs. Learned counsel for the plaintiff on the other hand asked that if liability is established against the defendants, damages are to be assessed separately as pleaded to enable the plaintiff to adduce evidence of the damages in respect thereof.

The Agreed Issues

[10] The agreed issues to be tried are as follows:

First Issue

[11] Whether the two news articles refer to the plaintiff.

Second Issue

[12] Whether the words complained of in the said news articles bear any defamatory meaning against the plaintiff.

Third Issue

[13] Whether the 1st and/or 2nd defendants published and/or were responsible for the publication of the said news articles.

Fourth Issue

[14] Whether the said statements were maliciously made against the plaintiff.

Fifth Issue

[15] Whether the said statements are qualified privilege.

Sixth Issue

[16] Whether the said statements made by the 1st and 2nd defendants were fair comments and made in good faith.

Seventh Issue

[17] If the answer to the fourth, fifth and sixth issues are in the negative, what is the quantum of damages the defendants are liable to pay to the plaintiff.

Preliminary Issue

[18] At the outset of his closing speech learned counsel for the defendants urged the court, by way of a "preliminary observation" to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980 ("the Rules") on the ground that the plaintiff failed to highlight or identify which paragraphs or parts of the defendants' statements that are defamatory of him and further failed to plead the extrinsic facts that he is seeking to rely on in proving the alleged innuendo.

[19] I see no reason to accede to the application. In the first place it is not part of the agreed issues to be tried and in any event no formal application under O. 18 r. 19 of the Rules was made by the defendants prior to the commencement of the trial. The defendants could also have applied for determination under O. 14A or under O. 33 r. 2 of the Rules but instead allowed the trial to proceed to its conclusion.

[20] Order 18 r. 19 is meant for striking out pleadings and indorsements and not for striking out a claim where the trial has commenced and evidence has been adduced. The shoulder note to r. 19 makes this patently clear. In fact r. 19(2) stipulates that if the application is made under para. (1)(a) no evidence shall be admissible. *A fortiori* where the trial has ended.

[21] More importantly there can be no dispute that the impugned statements were made and that they were made in the context of the speech made by Tengku Razaleigh. Therefore the question of identifying which paragraphs of the statements are

defamatory of the plaintiff does not arise. Clearly they are those parts of the statements that called for a re-investigation of the double six tragedy.

[22] In *Abd Rahman Mamat v. Zakaria Senik & 5 Lagi* [2002] 1 LNS 278 the plaintiff in his statement of claim did not particularise the alleged defamatory words. Nik Hashim J (as he then was) relying on *Karpal Singh Ram Singh v. DP Vijandran* [2001] 3 CLJ 871 held that the plaintiff's failure to plead precisely the defamatory words was not fatal as the plaintiff referred to the article and the article was tendered as exhibit and that further the failure did not prejudice the defendants in preparing for their defence.

Whether The Two Articles Refer To The Plaintiff (First Issue)

[23] It is trite law that in a libel action the words complained of must refer to the plaintiff. It was contended that the statements did not refer to the plaintiff as there was no reference to the plaintiff in the two statements. Learned counsel drew the court's attention to the plaintiff's own admission in cross-examination at p. 17 of the notes of proceedings, as follows:

> Q : Refer to pg 25 & 26 of Encl 33 –
>
> Do you agree that there was nothing (in writing) in pages 24 to 26 of Encl 33 alleging that you caused the incident (plane crash), that you conspired with others to assassinate the late Tun Fuad, that you wanted to replace the then Chief Minister by way of assassination and that you conspired with others to hand over petroleum wealth of Sabah to Petronas/Federal Government?
>
> A : I maintained my witness statement all were made insinuation and the rest are direct. May I read – (Read PWS1 para 23). Yes, nothing specifically expressed in this document.

[24] With due respect the contention is without substance and contrary to established principles. It is not necessary that the plaintiff must be mentioned by name. So long as he could be identified as the person targetted that will be sufficient. The decision of the House of Lords in *Knupffer v. London Express Newspaper Ltd* [1944] AC 116 is relevant, where it was held as follows:

> ... it is an essential element of the cause of action for defamation that the words complained of should be published "of the plaintiff". Where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so in fact does not arise if they cannot in law be regarded as capable of referring to him. If a defamatory statement made of a class or a group can reasonably be understood to refer to every member of it, each one has a cause of action ...

[25] In *E Hulton & Co v. Jones* [1910] AC 20 Lord Shaw of Dunfermline at p. 26 cited with approval the following directions to the jury by Abbot CJ in *Bourke v. Warren* 2 C & P 307:

> The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant.

[26] In the present case there can be no argument that those who are acquainted with the plaintiff could make out that he was the person meant by the 1st defendant in the two statements. It was pointed out that the plaintiff did not call any witness other than himself to support his contention that others reading the statements would conclude that the statements referred to him. There is no necessity for the plaintiff to do that. Tengku Razaleigh in his speech referred to him by name and even his position as the then Deputy Chief Minister of Sabah.

[27] Those who were present at the hall when Tengku Razaleigh delivered the speech would also know for certain that the plaintiff was the person referred to in the two statements. Further, the second statement was made in response to the plaintiff's challenge to the 1st defendant. By issuing the second statement in response to the plaintiff's challenge the 1st defendant could not have been referring to any person other than the plaintiff. I find it proved that the statements refer to the plaintiff.

[28] The fact that the plaintiff himself was his only witness to support his case is immaterial. It is an old principle that evidence is to be weighed, not counted. The court is more concerned with the quality of the evidence, not the quantity. The evidence of one

truthful witness weighs more than the evidence of any number of dishonest ones. This principle is embodied in s. 134 of the Evidence Act 1950 which provides as follows:

> No particular number of witnesses shall in any case be required for the proof of a fact.

Whether Statements Defamatory (Second Issue)

[29] There cannot be absolute and unrestricted freedom of speech. Such unfettered freedom would result in a person recklessly maligning others with impunity. Generally speaking, defamation is the issuance of a false statement about another person, which causes that person to suffer harm: www.expertlaw.com. It is a question of reputation, the deprivation of which amounts to a deprivation of life. This is what the Court of Appeal held in *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2000] 3 CLJ 224 where Gopal Sri Ram JCA (as he then was) said:

> Similarly, when a person is deprived of his reputation, it would in my judgment, amount to a deprivation of 'life' within article 5(1) of the Federal Constitution. The right to reputation is part and parcel of human dignity. And it is the fundamental right of every person within the shores of Malaysia to live with common dignity ... I would also mention in passing that the Supreme Court of India in *Sowmithri Vishnu v. Union of India Air* 1985 SC 1618 at pp 1621-1622, appears to have accepted an argument that the expression 'life' in article 21 of the Indian Constitution includes a person's reputation.

[30] Whether the statements are capable of bearing a defamatory meaning is in essence a question of law that turns upon the construction of the words published: *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461 CA. In *Gatley on Libel and Slander* 8th edn, the following passage can be found:

> A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency.

[31] The test of whether the words complained of are defamatory is an objective one. They are defamatory if, when viewed objectively they have a tendency to harm a person by lowering him in the eyes of right thinking members of the public. The rule that guides the court in deciding whether the words complained of are defamatory is the test of reasonableness: see *Jones v. Skelton* [1963] 3 All ER 952 where Lord Morris held as follows:

> The ordinary and natural meaning of the words may be either the literal meaning or it may be an implied or inferred meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be part of the ordinary and natural meaning of words (see *Lewis v. Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include an implication or inference which a reasonable reader, guided not by any special but only general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to the jury in any particular case to hold that a reasonable person would understand the words complained of in a defamatory sense.

[32] It is no defence for the defendant to show that he did not intend to defame the plaintiff however noble his intention was, if reasonable people would consider the language to be defamatory. In this regard it is apt to refer to the judgment of Lord Loreburn in *E Hulton & Co* (*supra*) where the learned judge said at p. 23:

> Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by shewing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention.

[33] Whether the defendants intended the words to have defamatory impression in the minds of ordinary readers is likewise irrelevant: see *Chin Choon v. Chua Jui Meng* [2005] 2 CLJ 569 where it was held that if reasonable people would think the language used to be defamatory of the plaintiff, the defendant must be taken to have intended the consequences naturally resulting from his act.

[34] Are the two statements defamatory of the plaintiff? Do they have a tendency to lower him in the estimation of others? On the surface the statements look innocent and harmless. They merely call for a re-investigation of the double six tragedy. But the sting lies beneath the surface. Read between the lines and in the context of the speech by Tengku Razaleigh the 1st defendant's call for re-investigation was in pith and substance a call to investigate the plaintiff for a possible involvement in a criminal act. There is nothing wrong for the 1st defendant to call for a re-investigation of the double six tragedy but when he insinuated that the plaintiff had blood on his hand without making any attempt to verify the truth of the alleged new information revealed by Tengku Razaleigh, the 1st defendant had crossed the line separating fair comment and malice aforethought.

[35] There is no mistaking the undercurrent, the undertone and the underpinning of the two statements. Each of them, in particular the second statement provoked speculation that the plaintiff knew in advance that something sinister was going to happen to the Nomad aircraft and that he had left the late Tun Fuad Stephens to die so that he could take over as Chief Minister of Sabah. The use of the words "crime" and "assassinations" *albeit* in reference to the assassinations of John F Kennedy, Martin Luther King and Benazir Bhutto was calculated to give maximum impact to the insinuation of conspiracy to assassinate. An indirect accusation is as potent, if not more potent than a direct one.

[36] The pleading itself reveals the defendants' real motive in calling for a re-investigation. By para. 19(b) of the statement of defence the defendants expressly pleaded that the public wants to know why the plaintiff did not board the same plane. It is not an innocent question. It is pregnant with insinuation that the plaintiff knew that the plane would crash and the reason why he did not board the plane was because he did not want to die.

[37] Viewed objectively and applying the reasonableness test the statements are clearly defamatory of the plaintiff. A conspiracy to assassinate is a capital offence punishable with death under s. 120B(1) of the Penal Code. The statements are therefore defamatory without proof of special damage: *Webb v. Beavan* [1883] 11 QBD 609; *Hellwig v. Mitchell* [1910] 1 KB 609; *Gray v. Jones* [1939] 1 All ER 798.

[38] Learned counsel for the defendants relied on the decision of the House of Lords in *Lewis v. Daily Telegraph Ltd* [1962] 3 WLR 50 to press home the point that an ordinary man would not infer guilt merely from the 1st defendant's call for a re-investigation of the air crash. That is true but only if the 1st defendant, in calling for a re-investigation had not insinuated anything sinister against the plaintiff.

[39] The 1st defendant in his testimony claimed that his comment on the incident was neutral because he used the words "May be nothing new will come out of the re-investigation". But the sentence that followed nullifies the neutrality of the words when he said "or may be something big and explosive will surface from the depths of history" and then spicing it up by referring to the assassinations of John F Kennedy, Martin Luther King and Benazir Bhutto. Thus, while the call for re-investigation was in itself perfectly neutral the insinuation that the plaintiff should be investigated for a possible criminal act took away whatever neutrality there was to the call for re-investigation.

[40] A statement that is motivated by a desire to impute someone with a disgraceful act is *prima facie* defamatory. Once the defamatory nature of the words are established the defendant can only escape liability by establishing the defence of justification, qualified privilege or fair comment. In the present case the defendants have abandoned their pleaded defence of justification. This must be taken to mean that the defendants do not wish to establish the truth of the 1st defendant's imputation of criminal culpability against the plaintiff based on the revelation by Tengku Razaleigh. This accords with the decision of the Supreme Court in *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 where it was held that upon proof of the defamatory nature of the statements the burden shifts to the defendant to prove that the statements are in substance and in fact true.

[41] It was submitted that the plaintiff was being ultra sensitive, citing *Tan Pei Ing v. Ainon Ali & Ors* [2009] 1 LNS 73 where Hishamuddin J (as he then was) said that the law of defamation is meant to protect the reasonable man, not the overly sensitive individual. With all due respect what the learned judge said in that case must not be taken out of context and without proper regard to the factual matrix of the case. In that case it is clear that the words complained of were legitimate letters of complaint and therefore the plaintiff was being overly sensitive when she sued the defendants for defamation. The words in the present case have a different dimension to it. They contained insinuations of serious criminal conduct on the part of the plaintiff. The decision is not authority for saying that if the words complained of are defamatory of the plaintiff he has no cause of action in defamation if he happens to be more sensitive than others similarly placed.

[42] As for myself I take the view that a person's level of sensitivity is irrelevant in a libel action. If the words complained of are defamatory of the plaintiff it does not matter if he was more sensitive than others. The test is whether the words when viewed objectively have a tendency to lower him in the eyes of right thinking members of the public, not whether he has thicker or thinner skin than others. It is not for the defendant to decide for the plaintiff how he should react to the words complained of if otherwise they are defamatory of him.

Whether Defendants Responsible For Publication (Third Issue)

[43] It is the defendants' pleaded case that they were not responsible for the publication of the two statements. At the trial however the 1st defendant in no uncertain terms admitted that he knew or expected his press statements to be published by the press. His evidence in cross-examination is as follows:

Q : Did you make a press conference or press release regarding your statement to call for re-investigation of the air crash incident on 6.6.1976?

A : There was a press release issued on 4.4.2010 and I think another one day later.

Q : Do you agree that at all material times you actually intended your statement to call for re-investigation on the air crash tragedy to be printed and published in the newspapers?

A : Whenever we issue a press release, obviously we leave it to the newspapers whether to publish it without editing or censorship.

[44] In *Slipper v. British Broadcasting Corp* [1991] All ER 165 it was held that the publication of a libel to a third party is treated as the natural and probable consequences of the original publication so as to expose the original publisher to a claim for damages in respect of the repetition. I have no doubt that it was the 1st defendant who caused the statements to be published.

Whether Statements Made Maliciously (Fourth Issue)

[45] This is the crux of the matter. Having abandoned the defence of justification the defendants are relying on the defence of qualified privilege and fair comment (fifth and sixth issues respectively). These defences will be defeated if malice is proved against the defendants. I shall therefore deal with the fifth and sixth issues together under this head (fourth issue) rather than to deal with them separately under their respective heads of issues to be tried.

[46] In *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2 Hepworth J explained that although there is a technical distinction between the defence of fair comment and qualified privilege, both defences are analogous in this respect, that the plaintiff will succeed if he can prove that the defendant was not acting honestly when he wrote the criticism or made the communication, but was actuated by actual malice, that is by some indirect and dishonest motive. The learned judge explained the distinction in the following terms:

> Second, the defence of fair comment must be distinguished from that of qualified privilege. In the defence of fair comment the right exercised by the defendant is shared by every member of the public. Everyone is entitled to comment. A newspaper reporter or a newspaper editor has exactly the same rights, neither more nor less, than every other citizen. In that of qualified privilege the right is not shared by every member of the public, but is limited to an individual who stands in such relation to the circumstances that he is entitled to say or write what would be libelous or slanderous on the part of anyone else. For instance, if a master is asked as to the character of a servant, and he says that the servant is a thief, he has a privilege which no one else would have. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion.

[47] Qualified privilege is a defence accorded by s. 12 of the Defamation Act 1957 ("the Act") which provides as follows:

> 12 (1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.
>
> (2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in the manner not adequate or not reasonable having regard to all the circumstances.
>
> (3) Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter or of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.
>
> (4) Nothing in this section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of the Libel Enactment of the Federated Malay States [FMS Cap. 70] and the Libel Ordinance of the Straits Settlements [SS Cap. 56] repealed by this Act) immediately before the commencement of this Act.

[48] It was contended that the new information revealed by Tengku Razaleigh was a matter of public interest and importance as the incident involved some very prominent public figures as well as the issue of oil royalty agreement between the Federal Government and the State of Sabah. It was submitted that the defendants were under a duty to impart that information and the public had an interest to receive it. Reliance was placed on *Jameel v. Wall Street Journal Europe Sprl* [2006] 4 All ER 1279 where Lord Hoffman said that if the publication is in the public interest, the duty and interest are taken to exist.

[49] What amounts to qualified privilege is set out in the case of *Toogood v. Sprying* [1834] 1 CM & Are at p. 193:

A In general, an action lies for malicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society.

[50] In *S Pakianathan* (*supra*) Wan Hamzah SCJ when speaking of qualified privilege said at p. 179:

The protection afforded by the law to a publication made on an occasion of qualified privilege is not an absolute protection but depends on the honesty of purpose of the person who makes the publication. If he is malicious, that is, if he uses the occasion for some other purpose than that for which the law gives protection, he will not be able to rely on the privilege … In ordinary cases, what is required on the part of the defamer to entitle him to the protection of the privilege is honest belief in the truth of what he published. But if he was moved by hatred or a desire to injure and used the occasion for that purpose, the publication would be maliciously made even though he believed the defamatory statement to be true. Where the defendant purposely abstained from enquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order to ascertain the truth, malice may rightly be inferred: *Lee v. Ritchie*.

[51] In *Words and Phrases Legally Defined* vol. 3 the following description of qualified privilege is given:

On grounds of public policy the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. As a general rule, there must be a common interest and corresponding duty or interest between the person who makes the communication and the person who receives it.

[52] Lord Atkinson expressed the following opinion in *Adam v. Ward* [1917] AC 309: A

> a privilege is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. B

[53] In principle therefore the defence of qualified privilege is only available where there is actual reciprocity of interest between the speaker and the recipient. A mere *bona fide* or honest belief C by the defendant that such an interest exists, or that he is under a duty to make the communication, will not be sufficient to establish a privileged communication: see *Abdul Rahman Talib* (*supra*) where the learned judge said:

D

> Any complaint or information as to such misconduct, neglect of duty, or abuse, though volunteered, is privileged, provided it is made in good faith to the person or body who has the power or duty to remove, punish or reprimand the offender, or to inquire into the subject matter of the complaint. Any citizen who *bona fide* believes that a wrong has been done has the right and duty to E bring the alleged fact before the proper authority for investigation. In doing so he exercises an undoubted privilege which is not in the public interest to penalize. But no privilege will attach to any such complaint or information if addressed to a person or body having no jurisdiction or control over the person whose conduct F is impugned nor any power or duty to grant redress for or inquire into, the abuse complained of. No protection can be afforded to a person who wrongly assumes the facts which constitute a privileged occasion. So no privilege will be attached to a complaint as to the conduct of a public official if it is given out for publication in the newspapers in advance of its delivery to the G proper authority for investigation.

[54] The above observations apply with equal force to the facts of the instant case. If indeed the 1st defendant had honestly believed that a criminal element was involved in the air crash, H he should have reported the matter to the relevant authority so that a proper investigation could be carried out. But instead of doing that the 1st defendant chose to make two statements to the press without first making any formal report to the relevant authority until to date. At the trial the 1st defendant tried to I

justify his failure to do so by saying that he would have lodged a formal report if not for the rule of subjudice. I agree with learned counsel for the plaintiff that this is an afterthought because the 1st defendant has not explained why such report was not made before the statements were published in the newspaper.

[55] In *Blackshaw v. Lord & Anor* [1983] 2 All ER 311 the defence of qualified privilege failed because the defendants had no legal, social or moral duty to communicate the information to the press representatives and that neither the media nor the world at large had common interest to receive the communication. Similarly in the present case the defendants had no duty to communicate the information to the press and neither the press nor the world at large had common interest to receive the information which in the way it was presented by the 1st defendant was in truth and substance an insinuation of criminal conduct on the part of the plaintiff.

[56] The burning question is whether the 1st defendant was actuated by malice, spite or improper motive when he caused to be published the statements complained of. The word "malice" is defined by the *Concise Oxford English Dictionary,* 11th edn as "the desire to do harm to someone". In *Horrock v. Lowe* [1974] 1 All ER 662 Lord Diplock when speaking of malice said:

> The motive which a person published defamatory matter can only be inferred from what he did or said. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling a deliberate and injurious falsehood about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

[57] Lord Diplock further said that if a person publishes the defamatory matter recklessly, without considering or caring whether it be true or otherwise, he is to be treated as if he knew it to be false. In *Mark Ignatius Uttley v. Wong Kam Hor & Anor* [2002] 8 CLJ 628 the defence of qualified privilege was also rejected because the defendants were totally indifferent to the truth or otherwise of the contents of the statements. It was the same outcome in *Dato' Dr Tan Chee Khuan v. Chin Choong Seng* [2011] 8 CLJ 574.

[58] In his witness statement the 1st defendant explained why the public should be informed about the new information revealed by Tengku Razaleigh and this was his explanation:

> I am involved in politics. The said plane crash took the lives of some very prominent political leaders in Sabah which is a very significant event in Sabah. The public would and should be given the chance to know on whether it is true that the plaintiff was the one who at the very last minute requested the said Tengku Razaleigh to board another plane and what was the real cause of the air-crash.

[59] Thus the basis of the 1st defendant's call for a re-investigation was that the public should be given the chance to know if it was true that it was the plaintiff who at the very last minute requested Tengku Razaleigh to board the other plane. However the 1st defendant admitted during cross-examination that he did not verify with Tengku Razaleigh on the accuracy of his revelation. He should have, because Tengku Razaleigh was available and it was easy for him to do so. It is obvious that the 1st defendant did not care whether the revelation by Tengku Razaleigh was true or not. He is therefore to be treated as if he knew the revelation to be false. This indifference and couldn't care less attitude is evidence of malice on the part of the 1st defendant and by extension the 2nd defendant.

[60] The 1st defendant further admitted in cross-examination that the new information does not establish the true cause of the plane crash but qualified it by saying that it does shed some light on the theory of overloading. Since no purpose would be served by re-investigating the incident based solely on the revelation by Tengku Razaleigh which "does not establish the true cause of the plane crash" the 1st defendant could not have been sincere in calling for a re-investigation.

[61] What then was the 1st defendant's motive in calling for a re-investigation of the air crash? Was it a *bona fide* call for a fresh investigation or was it a call to investigate the plaintiff for a possible criminal act? There is a subtle difference between the two motives. It is pertinent to note that Tengku Razaleigh in his speech did not call for a re-investigation of the air crash, let alone to suggest that the plaintiff was accessory to a criminal act. What the 1st defendant did was to give his own slant to Tengku Razaleigh's revelation in order to cast aspersion on the plaintiff.

It is clear that the 1st defendant had seized on the occasion to provoke public speculation that the plaintiff was up to no good when he asked Tengku Razaleigh to board another plane at the last moment. This is unfair to the plaintiff because the 1st defendant himself knew that there are conflicting historical accounts of the events prior to the crash.

[62] In fact Tengku Razaleigh's speech contradicted his previous statements on the incident as recorded in two books which the 1st defendant said was his reference books, namely *"Harris Salleh of Sabah" and "The Sabahan – The Life and Death of Tun Fuad Stephens"*. In the books it was recorded that Tengku Razaleigh was not invited to leave the ill-fated plane at the last moment. This is not denied by the 1st defendant as can be seen from his evidence in cross-examination, as follows:

> Put : The two books *Harris Salleh of Sabah* and *The Sabahan – The Life and Death of Tun Fuad Stephens* have put on public record the facts that Tengku Razaleigh was invited by the plaintiff at Kg. Layang-Layang in the afternoon and not at the last minute at the airport while Tengku Razaleigh was also not scheduled to fly back to Kota Kinabalu with the late Tun Fuad Stephens as he had a programme to visit a cattle farm in Banggi Island, agree?
>
> A : That's what the books say.

[63] In his witness statement the plaintiff reiterated that he was not in the same plane with the late Tun Fuad Stephens because he was supposed to accompany Tengku Razaleigh and a few others to visit a cattle farm in Pulau Banggi, Kudat by the other Nomad plane and that it was a prearranged program. In other words Tengku Razaleigh was not supposed to join the late Tun Fuad Stephens in the first place but to join the plaintiff for the trip to Pulau Banggi, Kudat. The plaintiff's explanation in answer to counsel's question in cross-examination is as follows:

> There were 2 Nomad aircrafts in Labuan Airport. One to fly the late Tun Fuad and other people straight to Kota Kinabalu, the other aircraft to fly to Kudat. It is usual for any aircraft flying from airport to airport must have passengers' list known as manifesto *(sic)*. Tengku Razaleigh and myself and Tun Rahman Yaakob were scheduled a program to visit Pulau Bangi. I wish to add this statement, the statement made by Tengku Razaleigh in

> 1996 compared to his statement in 2010 surely YA his statement in 1996 is more fresh in his mind. I do not know whether Tengku Razaleigh will be called as a witness to be asked which statement is true, the statement in the book or the statement he made on the 4.4.2010 here in Sabah. I wanted to add, surely anybody with common sense wont believe me to go into the aircraft where Tun Fuad, Tengku Razaleigh were already sitting in the aircraft, surely its very rude and improper for me to pull Tengku Razaleigh out of the aircraft.

[64] Thus going by the plaintiff's version of events it is untrue that his invitation to Tengku Razaleigh to visit Pulau Banggi was a last minute decision. But in fairness to Tengku Razaleigh he never said that the invitation was a last minute decision by the plaintiff. All he said was, he was already strapped to his seat when the plaintiff came over and invited him to go to Pulau Banggi. He did not say nor can his speech be construed to mean that there was no prior plan to visit the cattle farm at Pulau Banggi. Indeed there is nothing in his speech that contradicted the plaintiff's version, ie, that there was a pre arranged program for Tengku Razaleigh to visit Pulau Banggi together with him. It is possible that Tengku Razaleigh might have forgotten about this pre arranged plan because he did say in his speech:

> Saya pun ajak Tun Rahman Yaakob dan Tengku Arif Bendahara bersama dengan saya turun kerana saya kata elok juga kita ikut Datuk Harris ke Pulau Banggi kerana saya nak tengok rancangan bela sapi, kita panggil lembu, di Pulau Banggi. Jadi kita pun ikut Datuk Harris ikut kapalterbang jenis yang sama Nomad, kita pergi ke Pulau Banggi.

[65] No matter what one may wish to read into Tengku Razaleigh's revelation, the pivotal point of his speech was that the plaintiff's invitation saved his life. That was all there was to it. From the video recording of the speech at encl. 40, I am unable to detect any sign that Tengku Razaleigh's motive in making the revelation was to cast aspersion on the plaintiff. From the tone of his speech his intention was never to implicate anyone with any crime with regard to the air crash. It was the 1st defendant who came up with the idea of assassination.

[66] The theory of assassination is flawed for another reason. If indeed the plaintiff knew in advance that something sinister was going to happen to the plane, why then did he allow Tengku

Razaleigh to even board the plane at all? Surely it was within his power and means to prevent that from happening earlier if indeed he did not want Tengku Razaleigh to perish together with the late Tun Fuad Stephens and the other Cabinet Ministers and officials.

[67] It makes no sense for the plaintiff to make a last minute decision on such an important matter as to save someone's life, and thereby exposing himself to the kind of suspicion that is being cast upon him now. It was highly presumptive of the 1st defendant to infer criminal behaviour on the part of the plaintiff merely by his act of asking Tengku Razaleigh to leave the plane at the last minute. As a lawyer himself surely the 1st defendant would appreciate that something more than that was required to draw any conclusion of criminal complicity.

[68] Let us bring the argument further. If it is true that the plaintiff knew that the plane would crash it would mean that he had wanted not only the late Tun Fuad Stephens to die but also Tun Abdul Rahman Yaakob, the Tengku Bendahara of Pahang and the other State Cabinet Ministers and officials who were also in the same plane, not to mention the pilot of the aircraft and his own son. That would rank the plaintiff as a mass murderer. I think that is rather far fetched. The 1st defendant should have thought of this and given the benefit of the doubt to the plaintiff before recklessly making the two statements.

[69] To lend support to the plaintiff's allegation of malice there is evidence of bad blood between the plaintiff and the 1st defendant. In 1999 the plaintiff filed an Election Petition K5 of 1999 against the 1st defendant causing the 1st defendant to lose his seat in the State Assembly and was disqualified from contesting in the elections until recently. In that action one of the allegations made by the 1st defendant was that the plaintiff was responsible for surrendering the oil wealth of Sabah to the Federal Government. At the trial of the present action the defendants called a witness to testify that the plaintiff rushed to sign the Petroleum Agreement, clearly showing that the defendants are still blaming the plaintiff for allegedly "signing off" Sabah's oil wealth to the Federal Government.

[70] It must have been frustrating for the 1st defendant being the president of the 2nd defendant to be unable to contest in the elections as a result of the election petition filed by the plaintiff in

1999. It is therefore not a long shot for the plaintiff to suggest that the 1st defendant was still sore over the election petition and had used the new revelation by Tengku Razaleigh to vent his anger at the plaintiff and to settle an old score.

[71] As for the defence of fair comment s. 9 of the Act is relevant and provides as follows:

> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained are proved.

[72] It was submitted that the two statements made by the 1st defendant were mere comments and not statements of fact and that the call for re-investigation was on a matter of public interest. The 1st defendant testified that he has no spite towards the plaintiff and that as recently as August 2008, the defendants paid a courtesy call on the plaintiff at his home in Likas and invited him to be a key speaker at the 2nd defendant's convention which the plaintiff accepted.

[73] To sustain the defence of fair comment the defendants must prove the following:

(a) the words complained of are comments;

(b) the comments are based on facts;

(c) the comments or opinion expressed are fair; and

(d) the comments must be on matters of public interest.

[74] The learned authors of *Gatley on Libel and Slander* (*supra*) defines comment as follows at p. 697:

> Comment is a statement of opinion on facts. It is comment to say that a certain act which a man has done is disgraceful or dishonourable; it is an allegation of fact to say he did the act so criticized … while a comment is usually a statement of opinion as to merits or demerits of conduct, an inference of fact may also be a comment. There are, in the cases, no clear definitions of what is comment. If the statement appears to be one of opinion or conclusion, it is capable of being comment.

[75] Comment to be fair must be based on facts. In *Hasnul Abdul Hadi v. Bulat Mohamed & Anor* [1977] 3 LNS 2 the defence of fair comment failed because the defendants failed to prove that the facts on which the comment was founded were true. In *London Artist Ltd v. Littler* [1969] 2 QBD 375 Lord Denning spoke of "basic facts" when he said at p. 391:

> In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter: see *Cunningham-Howie v. Dimbleby* [1951] 1 KB 360, 364. They are the facts on which the comments are based or from which the inferences are drawn – as distinct from the comments or inferences themselves. The commentator need not set out in his original article all the basic facts: see *Kemsley v. Foot* [1952] AC 345; but he must get them right and be ready to prove them to be true.

[76] In the context of the present case the basic fact is Tengku Razaleigh's revelation that the plaintiff asked him to leave the Nomad aircraft minutes before take off. This is the basic fact from which the insinuation of criminal conduct was drawn by the 1st defendant. The 1st defendant must get this fact right as a first step in establishing the defence of fair comment. This is necessary because Tengku Razaleigh's version of the events was disputed by the plaintiff but which the 1st defendant did not believe. Was it really a last minute decision by the plaintiff and if so was there any plausible explanation for it?

[77] The 1st defendant should have verified with Tengku Razaleigh the accuracy of the new information before issuing the second statement. By not making any attempt to verify the accuracy of Tengku Razaleigh's revelation it is obvious that the 1st defendant had purposely abstained from enquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation. There is no doubt in my mind that the 1st defendant's intention in issuing the second statement was to tell the general public that the plaintiff's version of the events should not be believed.

[78] In *Joshua Benjamin Jeyaretnam v. Goh Chok Thong* [1989] 1 LNS 34 the Privy Council said at p. 3:

> It is of course well established that a writer may not suggest or invent facts and then comment upon them, on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. The commentator must get his basic facts right.

[79] It behoves therefore on the defendants to call Tengku Razaleigh to clarify his statement in order to establish the defence of fair comment. In *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 Siti Norma Yaakob JCA (as she then was) said:

> He who alleges must prove such allegations and the onus is on the appellant to do so. See section 103 of EA. Thus, it is incumbent upon the appellant to produce … his witnesses to prove the allegation. The fact that the appellant was unable to secure the attendance of … a witness does not shift the burden to … produce the witness … There is no obligation in law for the respondent to produce the witness as the obligation rests with … the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under section 114(g) is invoked against the appellant.

[80] By failing to call Tengku Razaleigh to give evidence the consequence is that the defendants had merely proved that the revelation was made by Tengku Razaleigh but without proving the truth and accuracy of what he revealed. Since the burden is on the defendants to prove the truth and accuracy of the new information, the failure means that the burden has not been discharged.

[81] I am satisfied that malice has been proved against the 1st and 2nd defendants on the balance of probability. This disposes of the defence of qualified privilege and fair comment.

The Defence Witnesses

[82] The defendants called seven witnesses to support their case but it is clear to me that they were called merely to reiterate why a re-investigation of the double six tragedy is necessary. Their testimonies add nothing to what the 1st defendant has already established in his defence and through the cross examination of the plaintiff. In particular none of them could shed light on the accuracy of Tengku Razaleigh's revelation, farther still to show the truth of the revelation.

[83] One witness, namely Datuk Jomilon Mojuntin @ Conrad Mojuntin (DW5) a former State Cabinet Minister under the plaintiff's administration even produced a handwritten letter he wrote to God (exh. D1). I have read the contents of the letter and it is clear to me that they have no relation to the issues before the court. The only connection is that he is a blood brother of one of those killed in the air crash and that he wanted a re-investigation in order to know the truth about the incident. I do not consider DW5's evidence to be of any assistance in determining the issue of qualified privilege and fair comment raised by the defendants. In any event his letter was addressed to God. It is best that the matter be left to God.

[84] Datuk Dr Gafari bin Kitingan @ Geoffrey Kitingan (DW6) gave a long and winding explanation on a matter that is only remotely relevant to the issues before the court. If at all, his testimony on the oil agreement issue supports the plaintiff's claim of malice as it confirms the fact that the 1st defendant was unhappy with the plaintiff for signing the Petroleum Agreement on behalf of the State Government so soon after the demise of the late Tun Fuad Stephens. The following questions posed by DW6 in his testimony is reflective of the defendants' real motive in calling for a re-investigation:

> This is a big tragedy involving half of the cabinet ministers and they were supposed to be in Labuan to sign an oil agreement and from what we know the agreement was not signed and there was a crash including the CM who was supposed to sign the agreement. And then one week later it was signed by the next CM who took over who was not in that plane and who invited the Petronas Chief the other party to the agreement out of the plane to another plane. So wont you want to know? Would that not raise so many questions? Would not that lead to so many speculations? Some may even speculate that this incident may have been planned otherwise why would this tragedy happen. Why was the agreement not signed? Why some people went out of the plane? Why was the agreement rushed when the state and the families were still mourning.

[85] I fail to see how the issue of oil royalty, even though pleaded and raised at the trial has any real bearing on the defence of qualified privilege and fair comment. I get the sense that the primary object of raising the oil royalty issue was to advance a political agenda rather than to assist the court in arriving at a just

decision. It is clear that the defendants are blaming the plaintiff for "surrendering" the state's oil resources to Petronas by signing the Petroleum Agreement while he was Chief Minister, thus causing Sabah to lose revenue and hence the economic problem and suffering besetting the state today. I do not consider the evidence of any of the defence witnesses to be of any value in considering the issues before the court, not that the witnesses lack credibility or integrity. I have no doubt that they are men of integrity with the interest of Sabah at heart.

Credibility Of The Plaintiff

[86] In his written submissions learned counsel for the defendants devoted considerable space in attacking the character of the plaintiff and his reliability as a witness. In my view having regard to the agreed facts and the nature of the issues before the court the credibility of the plaintiff is not crucial in determining whether the statements are defamatory. There is incontrovertible evidence that the statements were made by the 1st defendant and that the statements were published to a third party. There is also no dispute that Tengku Razaleigh did make the speech and it was based on this speech that the statements were made. The only dispute is whether the statements referred to the plaintiff and if so whether they were defamatory of him. Once these are established it is for the defendants to establish the defence of qualified privilege and fair comment.

[87] In any event I do not find the plaintiff to be a dishonest and unreliable witness. Even though he was evasive at times during cross-examination I do not find that to be indicative of falsehood. To my mind that is expected of a witness repeatedly asked to answer questions which he had already answered or which to him were matters for the court to decide. Perhaps the following exchanges between counsel and the plaintiff in cross-examination will illustrate the point:

> Put : That no matter how you read it whether it is word for word, para by para, or in between the lines or in whatever context there is absolutely nothing wrong with the statement and no motive can be found from that statement.
>
> A : As I stated earlier the interpretation of the whole package will be up to the court not for both counsels to interpret. (page 34 of the notes of proceeding)

Q : Where is it in that statement that there is malice and criminal allegations against you?

A : I have nothing to add to my witness statement and to my answers already given.
(page 35 of the notes of proceeding)

Put : There is nothing in the statement that shows malice and criminal allegation against you, it is simply a figment of your imagination and being over sensitive.

A : I disagree. As I said let the Court interpret both sides statements later on.
(page 36 of the notes of proceeding)

Put : That you are not able to tell in no uncertain terms the 1st defendant's statement suggesting who are to be investigated?

A : As I say I have nothing to add further to my answer and I add that surely right or wrong it is not for the Datuk learned counsel to make judgment here, it is up to the court.

D/C : This witness need to be guided.
(page 55 of the notes of proceeding)

Damages (Seventh Issue)

[88] Quantum of damages is an agreed issue to be tried in the event liability is established. However learned counsel for the plaintiff asked that damages be assessed separately. I do not see the need for that, more so when both sides have presented their submissions on damages. In the event I proceeded to assess damages and after anxious consideration awarded a global sum of RM1 million to the plaintiff.

[89] Learned counsel for the defendants implied in his written submissions that being a retired politician the plaintiff is not even worth a penny. I believe the Malay equivalent to this is *satu sen pun tak guna*. A man's reputation cannot be quantified in terms of ringgit and sen. Damages are awarded not to put value to a person's reputation but to compensate him for the harm done. But of course this is not to say that a person's reputation good or bad is irrelevant in determining the quantum of damages to be awarded.

[90] It is demeaning to say that the plaintiff, who was made a Tan Sri recently is a useless person. Even though he is a retired politician nothing can take away the fact that he was Chief Minister of Sabah for nine years from 1976 to 1985, irrespective of one's own judgment on his contributions to the state and the people of Sabah during his tenure as Chief Minister. There is in any event no evidence that the plaintiff is a person of questionable repute.

[91] The 1st defendant being a former Chief Minister himself and an active politician should have known that his public statements on such a controversial issue would attract wide publicity and would be taken seriously by the general public. He should have anticipated the impact of his defamatory statements on public opinion and the effect they would have on the plaintiff's dignity and reputation.

[92] The seriousness of the libel and the recklessness in the way it is published are relevant factors in determining the quantum of damages. In the present case the insinuation of criminal conduct was a very serious libel perpetrated on the plaintiff. Nothing can be more humiliating than to be accused of plotting to murder a serving Chief Minister in order to usurp his position, compounded as it was by the reckless manner in which the defamatory statements were published.

[93] From the defendants' conduct at the trial I get the distinct impression that they were using the trial process to further sensationalise the issue and ridicule the plaintiff rather than to put up a *bona fide* defence. It is obvious that the defendants showed no remorse whatsoever for defaming the plaintiff. In *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577 it was held by the Court of Appeal that the conduct of the defendant at the trial and in their written submissions are relevant to be taken into account in determining the quantum of damages to be awarded for libel. At p. 524 Gopal Sri Ram JCA (as he then was) said:

> Lastly, a court is entitled, and should have regard to the conduct of a defendant in a libel action. That conduct extends from at least the date of publication of the libel – although there may be cases where conduct antecedent to the publication may become relevant – until the final speeches at the trial. Such conduct will have a

A bearing on the making of an award for exemplary damages. This area of the law is well covered by the decisions in *Rooks v. Barnard* [1964] AC 1129; [1964] 1 All ER 367; [1964] 2 WLR 269 and in *Cassell* that no repetition of it is called for.

B **[94]** In *The Law of Defamation in Singapore and Malaysia* by Keith R Evans, MLJ Sdn Bhd 1988, Chapter 12 at pp. 101-105 the learned authors have this to say:

> The defendant's conduct throughout the period of time from publication of the statement to the final order of the court can be
C taken into account in determining damages. Such conduct may also have a bearing on the award of costs to an otherwise successful party. By contrast, if the defendant does not contest the clear case of defamation, and raises no unfounded defences, this will be a mitigating factor in the assessment of damages.

D **[95]** In *MGG Pillai* (*supra*) the following damages were awarded against the respective defendants for defamation:

(1) as against the first defendant, a sum of RM3 million.

E (2) as against the second defendant, a sum of RM750,000.

(3) as against the third defendant, a sum of RM2 million.

(4) as against the fourth defendant, a sum of RM1 million.

F (5) as against the fifth defendant, a sum of RM250,000.

(6) as against the sixth defendant, a sum of RM2 million.

(7) as against the seventh defendant, a sum of RM1 million.

G **[96]** The defamatory words in that case were mild compared to the defamatory sting of the words in the present case, which is an insinuation of a hideous plot to assassinate a serving Chief Minister. Yet the court awarded a total sum of RM10 million to the plaintiff. It must be borne in mind that the sum awarded in
H that case relates to the value of money in the year 1995. It is now 2012. The quantum of damages to be awarded must take into consideration inflationary factors and money's worth at the present day.

I **[97]** Gopal Sri Ram JCA in the same case when speaking of quantum of damages for defamation said at p. 521:

> I must record my strong disapproval of any judicial policy that is directed at awarding very low damages for defamation. That is not to say that low or even nominal damages may not be awarded in particular cases, for example, where a plaintiff is without any or any worthwhile reputation. But I do hold the view that injury to a person's reputation may occasion him at least as much, if not greater, harm than injury to his or her physical self. No one … should rest in comfort that a person's reputation may be injured with impunity on the footing that the consequence would be payment of a few thousand ringgit in damages.

[98] Lamin PCA had stronger words:

> If the learned judge below had ordered two fold or even threefold the damages as handed out to the first appellant, I would have said nothing against it.

[99] The defendants have urged the court not to award any damages to the plaintiff or to award only nominal damages and not to order the defendants to pay costs in the event liability is established. This is also an aggravating factor: *Chin Choon v. Chua Jui Meng* (*supra*).

[100] In his written submissions learned counsel for the defendants referred to those parts of the judgment of Tan Chiaw Thong J in *Tun Datu Hj Mustapha Datu Harun v. Tun Datuk Hj Mohammad Adnan Robert, Yang Di-Pertua Negeri Sabah & Anor* [1988] 2 CLJ 330; [1988] 2 CLJ (Rep) 480 where the learned judge described the plaintiff as "prime mover", and one of the "main actors" in the constitutional plot to topple the then PBS Government by illegal means which "undoubtedly brought great shame and dismay to all responsible citizens who sincerely believe in the principles of parliamentary democracy practiced in our country."

[101] Learned counsel also referred to what he described as the plaintiff's "fetish" or "habit" of suing people for defamation as can be seen from the following court cases filed by the plaintiff:

(i) *Datuk Harris Mohd Salleh v. The Government of Malaysia & Ors* [2010] 1 LNS 1723.

(ii) *Datuk Harris Mohd Salleh v. Datuk Shafie Hj Apdal & Ors* [2009] 2 CLJ 682.

A (iii) *Datuk Harris Mohd Salleh v. Han Ling & Anor* [1996] 1 LNS 167.

(iv) *Datuk Harris Mohd Salleh v. Abdul Jalil Ahmad & Anor* [1983] 2 CLJ 211; [1983] CLJ (Rep) 521.

B (v) The suit against Datuk Joseph Pairin Kitingan filed in 1999.

[102] I can only think of one reason why the defendants drew the court's attention to all these cases, and that is to provide additional "oomph" to their allegation that the plaintiff is a person C of questionable character. The reference to the judge's remarks in the *Tun Mustapha* case is wholly unnecessary and unfair to the plaintiff as he was not even a witness in that case and therefore not in a position to defend himself against those remarks, whatever the context they were made.

D

[103] At the trial learned counsel confronted the plaintiff with a recent suit he filed against Datuk Shafie Apdal and reminded him that in that suit the High Court only awarded him RM50,000 in damages for defamation and this award was affirmed by the Court E of Appeal. With due respect to counsel his reliance on that suit to ridicule the plaintiff's claim of RM50 million in the present suit is misguided.

[104] It has now come to light, through the plaintiff's answer to F counsel's question in cross-examination that in that case Datuk Shafie Apdal had apologised publicly to the plaintiff and on top of that he contributed RM50,000 to Yayasan Islam. It is clear that Datuk Shafie Apdal regretted his action and was remorseful, unlike the 1st defendant in the present case. Further, when Datuk Shafie Apdal made the defamatory remarks it was only before 200 G kampung people. With due respect to learned counsel he was comparing chalk with cheese.

[105] In all the circumstances of the case I am of the considered view that a global sum of RM1 million for compensatory, H aggravated and exemplary damages is fair and reasonable, having regard to the seriousness of the libel, the recklessness in its publication and the strong aggravating factors weighing against the defendants.

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